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M&A Litigation in Delaware Courts from July to December 2017

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Abstract

This paper presents an overview of some of the most important decisions handed down by the Delaware Supreme Court and the Delaware Court of Chancery from July 2017 to December 2017 in lawsuits arising out of Merger and Acquisition (M&A) transactions.

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I. Introduction:

Since 2002, Delaware had consistently occupied the top rank in the *Lawsuit Climate Survey* periodically conducted by the U.S. Chamber for Legal Reform. However, in the *Survey* conducted in September 2017, Delaware fell precipitously to 11th place.¹ There have been various conjectures about the reason for the decline. One conjecture is that it is the consequence of the newly enacted legislative prohibition on fee-shifting provisions.² Another is that it is the result of other states having enacted legal reforms to make the environment more business-friendly.³

This comes against the backdrop of a sharp drop in merger challenges filed in Delaware courts in recent years, at least partly as a consequence of the Delaware Court of Chancery's 2016 decision in *In re Trulia, Inc. Stockholder Litigation*,⁴ the Delaware Supreme Court's 2015 decision in *Corwin v. KKR Financial Holdings LLC*,⁵ and the Delaware Supreme Court's 2014 decision in *C&J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust*.⁶ The *Trulia* decision was one of the factors that sparked a big increase in merger-related litigation in federal courts in 2017.

Notwithstanding these developments, because of the experience and expertise of the Delaware Court of Chancery and the Delaware Supreme Court in corporate litigation, the cachet of the decisions issued by the two courts in corporate law matters remains undiminished. Following is a brief overview of the decisions issued by the Delaware courts in Merger & Acquisition cases in the period between July 2017 and December 2017.

II. A brief overview of significant Merger and Acquisition cases decided by the Delaware Courts in the second half of 2017:

1. *ACP Master Ltd., et al., v. Sprint Corporation, et al.*:⁷

The case arose out of a merger whereby Sprint Corporation, a majority stockholder of Clearwire Corporation, acquired 49.8% of Clearwire's equity at \$5.00 per share. Sprint had earlier

¹ See: U.S. Chamber Institute for Legal Reform, *2017 LAWSUIT CLIMATE SURVEY, Ranking the States: A Survey of the Fairness and Reasonableness of State Liability Systems, September 2017*. The *Survey* seeks to quantify the perceptions of corporate attorneys regarding various issues, including the impartiality and competence of trial judges and how good the judicial review is. Available at: <https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf>.

² Sections 102 (f) and 109 (b) of the Delaware General Corporation Law became effective on August 1, 2015. These provisions prohibit corporate documents from subjecting a shareholder to attorney fees or expenses of the corporation or any third party in relation to a Section 115 "internal corporate claim." There were also other significant amendments to the DGCL in 2017, authorizing the use of "blockchain technology," and making mergers between Delaware and non-Delaware corporations easier.

³ It will be useful to note here by way of background that 2017 was a banner year for M&A activity worldwide. The final quarter of the year was particularly strong with some of the largest M&A deals of 2017 having been announced in the last two months of that year. Among the reasons for this are thought to be the booming stock market and the low interest rates.

⁴ *In re Trulia, Inc. Stockholder Litigation*. Opinion available at: <https://courts.delaware.gov/opinions/download.aspx?ID=235370>. The Court of Chancery here ruled that disclosure-only settlements would be subjected to much greater judicial scrutiny than they had been in the past.

⁵ *Corwin v. KKR Financial Holdings LLC*. 125 A.3d 304 (Del.2015).

⁶ *C&J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust*. 107 A.3d 1049. (Del.2014).

⁷ *ACP Master Ltd., et al., v. Sprint Corporation et al.* C.A. No.8508-VCL.; *ACP Master Ltd., et al., v. Clearwire Corporation*. C.A. No. 9042-VCL. Decided by the Court of Chancery of the Court of Delaware on July 21, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=259730>. Corrected on August 8, 2017. Available at: <https://www.courts.delaware.gov/Opinions/Download.aspx?id=260500>.

offered to pay \$2.97 per share, but in view of considerable shareholder opposition and a subsequent higher bid by a competitor, negotiations ensued and the price of \$5.00 per share was agreed upon. The petitioners in the present case were shareholders of Clearwire who had dissented against the merger. In the lawsuit, the petitioners alleged that Sprint had committed breaches of fiduciary duty – aided and abetted by Softbank, which had acquired a majority shareholding of Sprint. The petitioners also sought an appraisal of their shares.

On the assumption that Sprint was the controlling stockholder of Clearwire, the Court applied the “entire fairness” standard of review.⁸ The Court held that in spite of certain events in the early stages of the merger transaction process, in view of the stockholders’ opposition to Sprint’s initial offer and the subsequent bidding war with a competitor, the consequent merger price and process had been entirely fair.

On the question of valuation, the Court used a discounted cash flow analysis which was consonant with the approach taken by the experts of the opposing parties in the case. The figures arrived at by the opposing experts, however, revealed a huge discrepancy. The petitioners’ expert computed a figure of \$16.08 per share, whereas Sprint’s expert computed a figure of \$2.13 per share. The Court accepted the DCF analysis of Sprint’s expert and concluded that Clearwire Corporation’s fair value was \$ 2.13 per share, which was considerably less than the merger price of \$ 5.00 per share. The Court thereby concluded that: “The defendants proved for purposes of the fiduciary analysis that the Clearwire-Sprint Merger was entirely fair. They also proved for purposes of the appraisal proceeding that the fair value of Clearwire on the closing date was \$ 2.13 per share.”⁹ The Court also ruled in the favor of Softbank on petitioners’ claim regarding aiding and abetting.

The Court’s opinion in this case is significant inasmuch as it being the second time in 2017 that the Court had determined the fair value as being considerably lower than the merger price.¹⁰ This should give pause to shareholders weighing the practical implications of seeking appraisal in merger cases.

2. *In re Martha Stewart Living Omnimedia, Inc. Shareholders Litigation*:¹¹

In this case, the Court considered the ramifications of the decision in *Kahn v. M&F Worldwide*¹² as

⁸ The “entire fairness” standard is an exacting standard that requires the Court to determine that the transaction is fair in respect of both process and price. See generally: *Krasner v. Moffet*, 826 A.2d 277 (Del.2003), *Texlon Corp. v. Meyerson*, 802 A.2d 257 (Del. 2002), *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del.1983), *In re. TD Banknorth Shareholders Litigation*, 938 A.2d 654 (Del.Ch.2007), *Cinerama, Inc. v. Technicolor*, 663 A.2d at 1162 (Del.1995), *Valeant Pharm.Int’l v. Jerney*, 921 A.2d 732 (Del.Ch.2007).

⁹ *Supra* note 7, at internal page 95 of the Court’s Opinion.

¹⁰ The first such case was *In re Appraisal of SWS Group, Inc.* C.A. No. 10554-VCG, 2017 WL 2334852 (Del. Ch.May 30,2017). Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=257320>.

¹¹ *In re Martha Stewart Living Omnimedia, Inc. Shareholders Litigation*. Consolidated C.A. No. 11202-VCS. Decided by the Court of Chancery of the State of Delaware on August 18, 2017. Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=260830>.

¹² *Kahn v. M&F Worldwide*, 88 A.3d 635 (Del.2014). No. 334, 2013. Court Below – Court of Chancery of the State of Delaware C.A. No. 6566. Decided by the Supreme Court of Delaware on March 14, 2013. Opinion available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=202790>. The Supreme Court of Delaware stated (at internal page 18 of the Opinion):

To summarize our holding, in controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed;

they relate to transactions the Court termed “conflicted one-side controller transactions.”¹³

The plaintiffs were former stockholders of Martha Stewart Omnimedia Company which was sold to a third party buyer. The plaintiffs filed suit against the former controlling shareholder Martha Stewart, alleging breaches of fiduciary duties relating to the sale and against the buyer, alleging aiding and abetting of the breaches. The plaintiffs contended that the controlling shareholder had taken advantage of her position to obtain a higher consideration for herself as compared to the other stockholders and that the transaction was subject to the entire fairness standard of review. The Defendants filed a motion to dismiss.

The Court here considered whether the Delaware Supreme Court’s ruling in *Kahn v. M&F Worldwide* which applied in the case of a squeeze-out merger, would also apply in a case such as this where the controlling stockholder was the seller and an independent third party was the buyer. On the facts of the case, the Court was required to determine at the outset what the applicable standard of review would be. The Court set it out thus:

In this case, the question has two parts: (1) whether Plaintiffs have pled facts that allow a reasonable inference that Stewart engaged in a conflicted transaction; and if so, (2) whether Plaintiffs have pled facts that allow a reasonable inference that the dual procedural protections employed in connection with this transaction fell short of what is required under Delaware law to justify business judgment review of Plaintiffs’ breach of fiduciary duty claim at the pleadings stage.¹⁴

The Court ruled that abiding with the procedural safeguards adumbrated in *M&F Worldwide* would protect a controlling stockholder in a case such as this from allegations of conflicts of interest due to payment of disparate consideration and resultant claims of breaches of fiduciary duties. Upon a considered assessment of the plaintiffs’ claims, the Court ruled that the breach of fiduciary duties claim against the controlling stockholder was subject to the business judgment standard of review and that the transaction could only be challenged on the ground of waste, which claim the plaintiffs had not made. The Court here reiterated its deference to decisions that were the result of an adherence to Court-sanctioned procedural safeguards that led to fair outcomes. On that basis, the defendants’ motion to dismiss was granted by the Court.

3. *Richard L. Salberg and David Pinkoski v. Genworth Financial, Inc.*:¹⁵

In this case, the Delaware Court of Chancery considered the practical application of the *Garner*

and (vi) there is no coercion of the minority.
(Internal footnote omitted.)

¹³ *In re Martha Stewart Living Omnimedia, Inc. Shareholders Litigation*. *Supra* note 11, at internal page 3 of the Court’s Opinion.

¹⁴ *In re Martha Stewart Living Omnimedia, Inc. Shareholders Litigation*. *Supra* note 11, at internal page 5 of the Court’s Opinion.

¹⁵ *Richard L. Salberg and David Pinkoski v. Genworth Financial, Inc.*
C.A.No.2017-0018-JRS. Decided by the Court of Chancery of the State of Delaware on July 27, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=260030>.

exception¹⁶ to the attorney-client privilege in the context of a Section 220 demand.¹⁷ The plaintiffs had filed a derivative action alleging breaches of fiduciary duties on the part of the directors and some officers of the defendant Corporation. While the derivative action was still pending, the defendant Corporation announced that it was to be acquired by another corporation. The plaintiffs sought documents under Section 220 to examine whether the valuation of the pending derivative claims had been factored into the consideration for the merger. Upon a detailed consideration of all the facts in the case, as well as the Delaware Rule of Evidence Section 502 (b) regarding attorney-client privilege and the decision of the Delaware Supreme Court in the *Wal-Mart* case¹⁸, the Court refused to apply the *Garner* exception even though the Plaintiffs' Section 220 demand had arguably satisfied the grounds that constituted "good cause." In doing so, the Court set out clearly that the application of the Garner exception was fact-specific and entirely within the Court's discretion. On that basis, the Court rejected the plaintiffs' Section 220 demand.

4. *DFC Global Corp. v. Muirfield Value Partners L.P.*:¹⁹

This case involved the acquisition of DFC Global Corporation (DFCG) by a private equity buyer following a two-year sale process at the deal price of \$ 9.50 per share. Upon an appraisal action being filed certain stockholders of DFCG, the Delaware Court of Chancery held that although the sale process had been open, robust, and competitive, the deal price could not be the sole determinant of fair value,

¹⁶ Under the *Garner* exception, a stockholder has a right to access certain privileged documents of a company provided a "good cause" can be demonstrated. The existence of a "good cause" was to be determined on the basis of an evaluation of numerous factors set out in the Court's opinion. See: *Garner v. Wolfenbarger*, 430 F.2d 1093, 1104 (5th Cir.1970). The *Garner* exception was adopted by the Delaware Supreme Court in *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr.Fund*, 95 A.3d 1264, 1278 (Del.2014).

¹⁷ Section 220 (b) of the Delaware General Corporation law provides as follows:

220

...

(b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:

- (1) The corporation's stock ledger, a list of its stockholders, and its other books and records; and
- (2) A subsidiary's books and records, to the extent that:
 - a. The corporation has actual possession and control of such records of such subsidiary; or
 - b. The corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand:
 - 1 The stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation, and
 2. The subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.

...

(Title 8, Chapter 1, General Corporation Law. Available at: <http://delcode.delaware.gov/title8/c001/sc07/>.

¹⁸ *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr.Fund*, 95 A.3d 1264 (Del.2014).

¹⁹ *DFC Global Corp. v. Muirfield Value Partners L.P.* No.518, 2016. C.A. No. 10107. Decided by the Supreme Court of the State of Delaware on August 1, 2017. Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=260240>.

because of a private equity buyer's inherent business constraints and also uncertainty regarding possible heightened regulatory stringency over the industry in which DFCG functioned. In determining the fair value, the Delaware Court of Chancery used an amalgam of the deal price, a revised Discounted Cash Flow Analysis, and a Comparable Companies Analysis, giving equal weight to all three metrics. After further adjustments, the Chancery Court arrived at a final figure of \$ 10.30 per share as the fair value of DFCG's shares.

On appeal, the Supreme Court noted that the Court of Chancery's has broad discretion to make findings of fact, but that "those findings of fact have to be grounded in the record and reliable principles of corporate finance and economics."²⁰ The Supreme Court declined to countenance the Chancery Court's reasoning regarding regulatory risk. The Court reasoned:

Beyond the reality that prevailing economic theories assume that markets take information about all sorts of risk, including regulatory risk into account and price that information into the things traded on those markets, the record reveals that equity analysts, equity buyers, debt analysts, debt providers and others were in fact attuned to the regulatory risks facing DFC. For one thing, in the years leading up to the merger, DFC's stock price fluctuated, but it had an overall downward trend. ...²¹
[Internal citations omitted.]

So also, the Supreme Court rejected the Chancery Court's reasoning about the specific business constraints of private equity firms. The Court observed:

[A]ll disciplined buyers, both strategic and financial, have internal rates of return that they expect in exchange for taking on the large risk of a merger, or for that matter, any sizeable investment of its capital. That a buyer focuses on hitting its internal rate of return has no rational connection to whether price it pays as a result of a competitive process is a fair one.²²
[Internal citations omitted.]

The Delaware Supreme Court rejected all the other strands of the reasoning that the Court of Chancery had based its decision upon.²³ The Supreme Court concluded that "the decision to give one-third weight to each metric was unexplained and in tension with the Court of Chancery's own findings about the robustness of the market check."²⁴ On that basis, the Delaware Supreme Court reversed and remanded the case to the Court of Chancery for reconsideration of its decision.

²⁰ *Id.*, at internal page 50 of the Court's Opinion.

²¹ *Id.*, at internal page 52 of the Court's Opinion.

²² *Id.*, at internal page 57 of the Court's Opinion.

²³ Significantly, although the Court refused to make a presumption that the deal price embodied fair value, the Court observed that "a robust market check will often be the most reliable evidence of fair value..."

Id. at internal page 39 of the Court's Opinion.

²⁴ *Id.*, at internal page 85 of the Court's Opinion.

5. *Fortis Advisors LLC v. Shire US Holdings, Inc.*:²⁵

This case involved a dispute over milestone payments that the plaintiffs alleged to be due under a merger agreement. SARcode Bioscience Inc. was acquired by Shire US Holdings, a biopharmaceutical company. Under the merger agreement, a part of the consideration was to be paid up front, and further milestone payments were payable contingent upon the occurrence of certain conditions relating to a drug that SARcode Inc. had been seeking to develop. Fortis Advisors LLC, acting as a representative for the former stockholders of SARcode Bioscience Inc. filed the present suit alleging that two milestones specified in the agreement had been achieved and thereby defendant Shire US Holdings, Inc. was liable to pay \$425 million dollars to the plaintiffs. Defendant disputed plaintiffs' claim and filed a motion for dismissal of the complaint under Rule 12 (b)(6) of the Court of Chancery of the State of Delaware.

The case principally turned upon the interpretation of the terms of the agreement and is significant inasmuch as the Court rejected the plaintiffs' interpretation of the contract and thereby denied the plaintiffs' claim to the milestone payments even though the defendants had managed to successfully develop the drug and obtain FDA approval for it. In its interpretation of the contract, the Court relied upon settled principles.²⁶ Viewing the plain words of the contract as being unambiguous, the Court concluded that the defendant's interpretation of the Merger Agreement was the only reasonable interpretation, and that the plaintiffs had been unable to advance a reasonable interpretation in support of their claim. In doing so, the Court granted the defendant's motion to dismiss the complaint.

6. *In Re MeadWestvaco Stockholders Litigation*:²⁷

This case involved a merger between MeadWestvaco Corporation and Rock-Tenn Company. It was a stock-for-stock merger of equals. The merger was approved by MeadWestvaco's board, which was composed of nine directors, eight of whom were outside directors who were indubitably independent and disinterested. Merger negotiations between the parties had been carried out between the parties intermittently over a period of many months. The directors were exculpated from personal liability

²⁵ *Fortis Advisors LLC v. Shire US Holdings, Inc.* C.A. No. 12147-VCS. Decided by the Court of Chancery of the State of Delaware on August 9, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=260560>.

²⁶ The Court set out these settled principles in its Opinion thus:

Questions involving contract interpretation can be answered as a matter of law on a motion to dismiss "[w]hen the language of a contract is plain and unambiguous." Dismissal of a contract dispute under Rule 12(b)(6) is proper, however, "only if the defendants' interpretation is the only reasonable construction as a matter of law." If the Plaintiff has offered a reasonable construction of the contract, and that construction supports the claims asserted in the complaint, then the Court must deny the motion to dismiss even if the defendant's construction is also reasonable.
[Internal citations omitted.]

Fortis Advisors LLC v. Shire US Holdings, Inc. Id., at internal pages 12 and 13 of the Court's Opinion. The Court cited the following cases in support of these principles: *Capital Corp. v. GC Sun Hldgs., L.P.*, 910 A.2d 1020, 1030 (Del.Ch.2006); *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del.2003); and *Vanderbilt Income and Growth Assocs., LLC v. Arvida/JMB Managers, Inc.* 691 A.2d 609, 613 (Del.1996).

²⁷ *In Re Meadwestvaco Stockholders Litigation*. Consolidated C.A. No. 10617-CB. Decided by the Court of Chancery of the State of Delaware on August 17, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=260760>.

for breach of the fiduciary duty of care under Section 102(b)(7) of the Delaware Code by the inclusion of a provision to that effect in the certificate of incorporation. MeadWestvaco's three eminent financial advisors were of the opinion that the transaction was fair to the stockholders of the corporation and two major proxy advisory firms had recommended that the stockholders vote in support of the merger. Also, 98% of the MeadWestvaco stockholders had voted in favor of the merger.

The plaintiffs in the case were stockholders of MeadWestvaco Corporation who alleged that the directors had committed breaches of fiduciary duty in connection with the merger, and sought monetary damages in the suit. The plaintiffs also asserted a claim for aiding and abetting against Rock-Tenn Company. The gravamen of the plaintiffs' allegation was that MeadWestvaco directors had acted in bad faith while entering into the merger and in the process had inflicted substantial loss upon the stockholders. The defendants moved to dismiss the complaint on the grounds that the facts as set out in the complaint did not make a sustainable claim for bad faith and further that, in any event, the stockholder vote in favor of the merger had a cleansing effect on the transaction.

Upon determining that business judgment was the presumptive standard for evaluating the decision of the board and upon noting the existence of the exculpatory clause, the court reasoned that to sustain their claim regarding the directors' breaches of fiduciary duty, the complaint would have to set out facts that led to a reasonable inference that a majority of the directors were not disinterested and independent or that the directors had not acted in good faith.²⁸ The Court noted that:

This Court has held on numerous occasions that “to state a bad-faith claim, a plaintiff must show either [1] an extreme set of facts to establish that disinterested directors were intentionally disregarding their duties or [2] that the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.”²⁹
[Internal citation omitted.]

Upon a detailed consideration of the facts of the case as pled in the Complaint, the Court concluded that neither could it be reasonably inferred therefrom that the MeadWestvaco directors had committed breaches of their fiduciary duty regarding oversight, nor that they had acted in bad faith. The Court also determined that the plaintiffs had failed to state a claim for aiding and abetting against Rock-Tenn Company. On that basis, the Court granted the defendants' motions to dismiss.

7. *GreenStar IH Rep, LLC v. Tutor Perini Corp.*³⁰

This case arose out of a transaction whereby Tutor Perini Corporation (Tutor Perini) acquired Greenstar Services Corporation (Greenstar) in 2011. The merger agreement provided for earn-out payments that were to be made by Tutor Perini to Greenstar Interest Holder Representative for five

²⁸ *Id.*, at internal page 14 of the Court's Opinion. The Court, here, relied upon *BJ's Wholesale Club*, 2013 WL 396202.

²⁹ *Id.*, at internal pages 15 and 16 of the Court's Opinion. The Court, here, relied upon and cited *In re Chelsea Therapeutics International Ltd. Stockholders Litigation*, 2016 WL 3044721, at *7 (Del. Ch. May 20, 2016); *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *6 (Del. Ch. June 30, 2014); *BJ's Wholesale Club*, 2013 WL 396202, at *7; and *In Re Alloy, Inc.* 2011 WL 4863716, at *7 (Del. Ch. Oct. 13, 2011).

³⁰ *GreenStar IH Rep, LLC v. Tutor Perini Corp.* C.A. No.12885-VCS. Decided by the Court of Chancery of the State of Delaware on October 31, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=264040>.

one-year terms upon the achievement of certain specified milestones. After making the requisite earnout payments in the first two years after closing, Tutor Perini refused to make further payments in subsequent years. Greenstar Interest Holder Representative brought suit against Tutor Perini for damages for the non-payment of earnout dues for the third, fourth, and fifth years.

In addition to making certain affirmative defenses, Tutor Perini also filed a counter-claim against the former CEO of Greenstar who was also an Interest Holder, contending that he had furnished false information that had resulted in inflated payments for the first two years.

Greenstar Interest Holder Representative filed a motion for judgment on the pleadings in respect of three counts of the complaint and the former CEO of Greenstar filed a motion to dismiss the counterclaims. The Delaware Court of Chancery interpreted the merger agreement as being unambiguous regarding the mode and manner in which the earn-out payments were to be calculated and made and held that as a matter of law it was incumbent upon Tutor Perini to make the earn-out payments for the subsequent years as claimed by Greenstar Interest Holder Representative. The Court also held that in light of the fact that the contractual language clearly spelled out the intention of the parties, the implied covenant of good faith and fair dealing could not be availed of by Tutor Perini to read in terms which could well have been embodied in the merger agreement when it was drafted. Further, regarding Tutor Perini's allegation about the former CEO having furnished false information, the Court held that the pleadings did not measure up to the level of particularity required to sustain an allegation of fraud.

On that basis, the Court granted Greenstar Interest Holder Representative's motion in respect of three counts of the complaint and also granted the motion to dismiss the counterclaim filed by Greenstar's former CEO in respect of two counts of the counterclaim.

8. *van der Fluit v. Yates*:³¹

This case related to the acquisition of Opower, Inc. by Oracle Corporation. The transaction was in the form of a two-step merger.³² Plaintiff was a stockholder of Opower, Inc. who filed the present suit against the directors of Opower, Inc. alleging breaches of fiduciary duties, and an aiding and abetting claim against Oracle Corporation. Defendants filed a motion to dismiss. Plaintiff contended that the appropriate standard of review was either entire fairness or enhanced scrutiny because, the transaction was allegedly engineered by a controlling stockholder, and that it was not approved by an independent majority of the members of the board of directors. Alternatively, the plaintiff contended that the defendants had breached their Revlon duties.³³ Defendants contended that there was no controlling shareholder and that a fully informed, uncoerced majority of the shareholders had approved the transaction. Therefore, the defendants argued, the business judgment rule applied.³⁴ Furthermore,

³¹*van der Fluit v. Yates*. C.A. No. 12553-VCMR. Decided by the Court of Chancery of the Court of Delaware on November 30, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=265870>.

³² A mode of acquisition through a combination of a tender offer and a back-end merger.

It is provided for under Section 251 (h) of the Delaware General Corporation Law.

³³ See: *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del.1986). The Delaware Supreme Court here held that in cases involving the sale or break-up of a company, the fiduciary duty of the board was to ensure "the maximization of the company's value at a sale for the stockholders' benefit," (506 A.2d 173, at 182) and that the directors were to act as "auctioneers charged with getting the best price for the stockholders at a sale of the company." (506 A.2d 173, at 182).

³⁴ The defendants relied upon *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (2015). The Delaware Supreme Court here affirmed the Delaware Court of Chancery's holding that "the business judgment rule is invoked as the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders." *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (2015) at 305-306. The holding in *Corwin* was later clarified by the Delaware Court of Chancery as being appli-

the defendants contended that in any event, defendants had not made any allegations of breaches of non-exculpated fiduciary duties by the directors, nor had they pleaded any allegations of fact that showed any aiding and abetting by Oracle.

The Court found that although the plaintiff had not sufficiently pleaded the existence of a controlling stockholder, defendants were not entitled to the benefit of the presumed application of the business judgment rule under *Corwin* because the pleadings contained adequate allegations of fact to indicate that there had been important omissions in the offer disclosures resulting in the stockholders' vote not being fully informed. Nevertheless, the Court concluded that the pleadings did not adequately state non-exculpated breaches of the duty of loyalty by the board of directors, and also did not state an aiding and abetting claim against Oracle.

On that basis, the Court granted defendants' motion to dismiss the complaint.

9. *IRA Trust FBO Bobbie Ahmed v. Crane*.³⁵

This case related to the share reclassification of NRG Yield, Inc., a corporation with a controlling stockholder, NRG Energy, Inc. NRG Energy, Inc. had been in control of NRG Yield, Inc. since its inception but over the years had had a decline in its voting power due to the issuance of new shares for the purpose of financing asset acquisitions. Being concerned about losing control, NRG Energy, Inc. proposed that NRG Yield, Inc. reclassify its capital structure by issuing new classes of stock on a proportionate basis with diminished voting rights in order to finance further asset acquisitions. One effect of such a reclassification would be to ensure NRG Energy, Inc.'s continued control of NRG Yield, Inc. The proposal was subjected to approval by a special independent committee and a vote by a majority of the minority stockholders. Both conditions were duly fulfilled.

One class of stockholders of NRG Yield, Inc. filed suit claiming breaches of fiduciary duties on the part of directors of NRG Yield, Inc. in approving the transaction and on the part of NRG Energy, Inc. in causing the transaction to be made by NRG Yield, Inc. Defendants filed a motion to dismiss the complaint.

At the outset, the Court formulated the issues to be resolved at the motion stage thus:

- (1) Is the Reclassification a conflicted transaction subject to entire fairness review even though it nominally involved a *pro rata* distribution of shares?
 - (2) If so, should the analytical framework articulated in *Kahn v. M&F Worldwide Corp.*, a squeeze-out merger case, apply to the Reclassification?
 - (3) If so, has that framework been satisfied in this case from the face of the pleadings?³⁶
- (Internal citation omitted)

The Court answered all the issues in the affirmative. In the first place, the Court found that due to

cable to cases where a controlling stockholder had not derived a personal benefit (*In re Merge Healthcare Inc.*, 2017 WL 395981 (Del.Ch.Jan.30, 2017)), and barring a showing of waste, once it is determined that the business judgment rule is applicable, a dismissal of the claims ensues (*Singh v. Attenborough*, 137 A.3d 151 (Del.2016)). The application of the *Corwin* rule was further extended to first step tender offers under Section 251 (h) of the Delaware General Corporation Law (*In Re Volcano Corp. Stockholder Litigation*, 143 A.3d 727 (Del.Ch.2016))

³⁵ *IRA Trust FBO Bobbie Ahmed v. Crane*. Consolidated C.A.No.12742-CB. Decided by the Court of Chancery of the State of Delaware on December 11, 2017. Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=266400>.

³⁶ *Id.*, at internal page 3 of the Court's Opinion.

the fact that NRG Yield, Inc. derived the benefit of continuing its control of NRG Energy, Inc., which was something unique to NRG Energy, Inc. vis-à-vis the other stockholders, the share reclassification was a conflicted controller transaction. The Court, however, held that the framework set out by the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp.* was applicable in this case.³⁷ Upon a review of the cases in which the *Kahn v. M&F Worldwide Corp.* framework had been applied in various controller transactions, the Court concluded that the reasoning in those cases was equally relevant in the present case.³⁸ Finally, the Court considered whether the pre-requisites for the application of the business judgment standard as postulated by the Delaware Supreme Court in the *M&F Worldwide* case had been duly fulfilled.³⁹ Plaintiff's principal contention was that the vote of the minority in the present case was not informed as it was based upon disclosure violations in the proxy. Upon a detailed consideration of the plaintiff's contentions, the Court concluded that they lacked merit and that the pre-conditions as set out by the Delaware Supreme Court in *M&F Worldwide* had been duly fulfilled. Consequently, the Court held that the applicable standard of review was the deferential business judgment standard and not entire fairness. On that basis, the Court granted defendants' motion to dismiss the complaint.

10. *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., et al.*:⁴⁰

This was an appeal before the Delaware Supreme Court from a 2016 decision of the Delaware Court of Chancery. This case arose in connection with an appraisal demand under Section 262 of the Delaware General Corporation Law made by former stockholders of Dell Inc. pursuant to a management-led buyout. The merger consideration was \$13.75 per share, which was 37% higher than the 90-day average stock price. In a post-trial ruling, the Delaware Court of Chancery appraised the fair value of the shares at \$17.62 in spite of the buyout process having been robust. Disregarding both the deal price and the stock price, the Court of Chancery arrived at this figure, which was close to 30% above the deal price, by utilizing its own discounted cash flow analysis to compute the fair value of the shares. The Court of Chancery had founded its analyses principally on the bases that there had been a valuation difference between the stock price and its intrinsic value, that there had been only financial rather than strategic bidders, and that there were allegedly structural problems in management-led buyouts.

On appeal, the Delaware Supreme Court took issue with the reasoning of the Court of Chancery, finding it to be flawed and dissonant with the Court of Chancery's own findings of fact.⁴¹ The Supreme Court rejected the principal bases for the Court of Chancery's analysis and, given the facts of the case,

³⁷ *Kahn v. M&F Worldwide Corp.*, 88A.3d 635 (Del.2014). In this case, the Delaware Supreme Court had held that going-private mergers should be reviewed by the business judgment standard provide they are conditioned upon two procedural devices, namely: "approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders." *Kahn v. M&F Worldwide Corp.*, 88A.3d 635 (Del.2014), at 644.

³⁸ *Supra* note 35, at internal pages 25 to 32 of the Court's Opinion. The underlying rationale, according to the Court, was that adherence to the MFW framework caused the transaction to be a result of "an arm's-length bargaining process." *Supra* note 35 at internal page 29 of the Court's Opinion.

³⁹ The pre-requisites for the application of the business judgment standard as set out by the Delaware Supreme Court are enumerated in *Supra*, note 37.

⁴⁰ *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., et al.* No.565, 2016. Consolidated C.A.No.9322-VCL. Decided by the Supreme Court of the State of Delaware on December 14, 2017. Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=266610>.

⁴¹ *Id.*, at internal pages 38 to 65 of the Court's Opinion. The Supreme Court, inter alia, referred to the "efficient market hypothesis," which, in the words of the Court, "teaches that the price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness who caters her valuation to the litigation imperatives of a well-heeled client." (Internal citation omitted.) (*Id.*, at internal page 40 of the Court's Opinion.)

asserted the importance of market evidence as an accurate indicator of fair value.⁴² After dealing with related issues concerning taxes, expenses, and fees, the Delaware Supreme Court reversed in part the ruling of the Delaware Court of Chancery and remanded for further proceedings.

11. *Mark Lavin v. West Corporation*:⁴³

This case arose in connection with the merger of West Corporation with affiliates of Apollo Global Management. A preponderant majority of West Corporation's shares voted in favor of the merger. Plaintiff was a stockholder of West Corporation. Plaintiff made an inspection-of-books-and-records demand under Section 220 of the DGCL⁴⁴ for the stated purpose of examining the propriety of various aspects of the merger. West Corporation refused to accede to the demand on the grounds that the demand was too wide and that it was not restricted to a legitimate purpose. Plaintiff filed the present suit against West Corporation to compel inspection. In justifying its refusal, West Corporation, inter alia, relied on the Delaware Supreme Court's decision in *Corwin v. KKR Financial Holdings LLC*,⁴⁵ contending that the merger had been cleansed by the vote of "a majority of disinterested, informed, and uncoerced stockholders."⁴⁶ The Court found that the plaintiff had presented evidence that constituted a "credible basis"⁴⁷ for sustaining a claim of impropriety, and that the plaintiff had sought the books and records for a legitimate purpose. The Court further held that *Corwin v. KKR Financial Holdings LLC* could not be invoked at this stage to deny the plaintiff his Section 220 right. On that basis, the Court ruled in favor of the plaintiff.

III. Conclusion:

In sum, M&A litigation in Delaware Courts in the second half of 2017 related to an array of issues, and there were significant developments in the continuing evolution of the Delaware Courts' jurisprudence regarding M&A transactions. Three of the more prominent developments were: (i) The Delaware Supreme Court's reversal and remand of the Delaware Court of Chancery's decisions in *DFC*

⁴² The Court did, however, hold back from stating that market evidence should in all cases be decisive in determining fair value. Specifically, the Supreme Court stated:

In so holding, we are not saying that the market is always the best indicator of value, or that it should always be granted some weight. We only note that, when the evidence of market efficiency, fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of Mr. Dell's own votes is so compelling, then failure to give the resulting price heavy weight because the trial judge believes there was mispricing missed by all the Dell stockholders, analysts, and potential buyers abuses even the wide discretion afforded the Court of Chancery in these difficult cases.

Id., at internal page 60 of the Court's Opinion.

⁴³ *Mark Lavin v. West Corporation*. C.A. No. 2017-0547-JRS. Decided by the Court of Chancery of the State of Delaware on December 29, 2017. Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=267230>.

⁴⁴ *Supra* note 17.

⁴⁵ *Supra*, note 5.

⁴⁶ *Supra* note 43, at internal page 16 of the Court's Opinion.

⁴⁷ *Supra* note 43, at internal page 17 of the Court's Opinion.

*Global Corporation v. Muirfield Value Partners, L.P., et al.*⁴⁸ and *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., et al.*⁴⁹ provide valuable guidance on the right valuation methods to be used in statutory appraisal actions; (ii) In *Salberg v. Genworth Financial, Inc.*,⁵⁰ the Delaware Court of Chancery dealt with the issue of the applicability of the *Garner* doctrine to a stockholder demand for inspection of books and records under Section 220 of the DGCL; and (iii) The Delaware Court of Chancery's decision in *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation*⁵¹ highlighted the importance of adherence to the procedural framework laid down by the Delaware Supreme Court in *Kahn v. M&F Worldwide*.

The spurt in the filing of disclosure-only lawsuits in the U.S. Federal Courts during 2017⁵² and other developments notwithstanding, the Delaware Court of Chancery and the Delaware Supreme Court retain their reputational primacy as the leading courts in the United States in matters relating to corporate litigation.

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⁴⁸ *Supra*, note 19.

⁴⁹ *Supra*, note 40.

⁵⁰ *Supra*, note 15.

⁵¹ *Supra* note 11.

⁵² For statistical details, see: *NERA ECONOMIC CONSULTING, 29 January 2018, 25th Anniversary Edition, Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review*. Available at: http://www.nera.com/content/dam/nera/publications/2018/PUB_Year_End_Trends_Report_0118_final.pdf.